

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOANNE BUTLER)	
Claimant)	
)	
VS.)	
)	
FLINT HILLS CARE CENTER, INC.)	
Respondent)	Docket No. 1,054,878
)	
AND)	
)	
UNITED WISCONSIN INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 16, 2011, preliminary hearing Order Denying Compensation entered by Administrative Law Judge Brad E. Avery. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of her employment. However, the ALJ also found that claimant failed to give notice within 10 days and failed to show just cause to extend the notice period to 75 days.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 13, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that she failed to give timely notice of her accidental injury. Claimant testified that she told her supervisor, Sheila Jones, of her October 3, 2010, accident and left shoulder injury the next day.

Respondent contends the claimant failed to give notice of her alleged injury within 10 days and failed to show just cause to have that notice period extended. Respondent asserts that the ALJ found respondent's representative, Sheila Jones, to be a credible witness and asks the Board to defer to the ALJ in this instance because the ALJ had the opportunity to personally observe both claimant and Ms. Jones testify and judge their credibility. Accordingly, respondent asks the Board to affirm the ALJ's Order Denying Compensation.

The issue for the Board's review is: Did claimant give respondent timely notice of her accidental injury?

FINDINGS OF FACT

Claimant worked for respondent as a dietary cook. On October 3, 2010, she was doing dishes. She reached above her head to grab a crate and as she pulled, several crates fell. As claimant tried to catch and deflect the crates, she felt a pain in her left shoulder. Later during her shift, she picked up a roasting pan to put in the oven and felt a snap in her left shoulder, after which she again felt pain.

Claimant was working the evening shift, and there was no supervisor on duty, so she was unable to report her injury that night. Claimant testified she went in to work the next morning and told her supervisor, Sheila Jones, that she had injured her left shoulder, had not been able to sleep because of the pain, and was unable to move her shoulder. Claimant testified that Ms. Jones told her she should have completed an incident report the night before. Claimant said she told Ms. Jones there were no nurses at the desk and she did not know the procedure to follow. Claimant also testified that she told Ms. Jones that she needed medical treatment, but Ms. Jones did not agree to send her to a doctor. Because respondent did not offer her any medical treatment, she sought treatment on her own.

Claimant did not ask respondent for medical treatment again until she was terminated in February 2011. She said she now has pain in her left shoulder and left wrist. She claims problems with her right shoulder and neck as well, saying she used her right arm more in order to protect her left shoulder.

Sheila Jones is the certified dietary manager at respondent and was claimant's supervisor. When asked by respondent's attorney if claimant came in to work on October 4 and reported an accidental injury, Ms. Jones stated, "Not to my memory."¹ She said if claimant would have reported an injury to her shoulder, she would have remembered that. She said she did not recall claimant asking for medical treatment and said she did not deny claimant medical treatment. On cross-examination, Ms. Jones

¹ P.H. Trans. at 27.

clarified that she is specifically denying claimant told her she had injured her shoulder rather than being unable to remember one way or the other. She said if claimant had reported a shoulder injury, she would have taken claimant to the administrator because a shoulder injury is a serious injury.

Ms. Jones said she remembered that claimant came to work on October 8 with a burn on her finger. She said she asked claimant what happened and claimant said she had burned her finger at work on October 3. Ms. Jones testified she asked claimant if she had gone to the nurse's desk and filled out an incident report, but claimant replied that it was okay since it was just a burn. Ms. Jones said she reminded claimant that she needed to fill out an incident report because if she needed to see a doctor, it would not be covered by workers compensation. Ms. Jones denied there was any discussion about claimant's shoulder or any other work-related injury at that time. Claimant said at times she had suffered burns at work, but she denied having a bandage on her finger on October 8.

Ms. Jones testified that respondent's policy is that an injured employee should report the injury to his or her direct supervisor or, if that person is not available, report the injury to the charge nurse on duty. Ms. Jones said notices regarding reporting of work-related injuries are posted in the hallway where the time clock is located. She said reporting procedures are also discussed once a year at mandatory meetings. Claimant said she did not ever notice any kind of posting from the Division of Workers Compensation regarding an employee giving notice of an accidental injury.

Ms. Jones said she first heard that claimant was making a claim for an injury to her shoulder in March 2011 when her administrator brought the paperwork to her attention and asked if she had known of claimant's alleged injury. On March 15, 2011, Ms. Jones wrote a statement concerning claimant's burn injury. The statement does not mention claimant's left shoulder injury. Ms. Jones admitted that she had not made claimant fill out an accident report when she burned her finger. Ms. Jones said that she had been reprimanded for not making claimant fill out the required paperwork.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.³

ANALYSIS

Claimant testified that she advised her supervisor, Sheila Jones, of her October 3, 2010, accident and left shoulder injury on the morning of the day after it occurred. Claimant said she did not report the accident on the night it occurred because there were no supervisors on duty at that time. Claimant sought medical treatment on her own. Her testimony is supported by the fact that she did seek medical treatment and, on October 6, 2010, she reported her injury as work related to the Health Department.⁴

² K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

³ K.S.A. 2010 Supp. 44-555c(k).

⁴ The Health Department record for October 4, 2010, reflects claimant's chief complaint as "[l]eft shoulder pain x 3 days" which would put the onset of symptoms before October 3, 2010. P.H. Trans., Cl. Ex. 2 at 1. At the preliminary hearing, claimant denied having any problems with her left shoulder before October 3, 2010. P.H. Trans. at 5.

Claimant's testimony is contradicted by the testimony of Sheila Jones, who denies claimant spoke with her on October 4, 2010, and denies claimant ever reported a left shoulder injury. In addition, the Health Department's record of the October 6, 2010, follow up office visit reflects that "Patient was advised to report the work related injury and apply for workmen's compensation. Patient voiced understanding."⁵ The records do not reflect that claimant had already reported the injury and was denied medical treatment under workers compensation by her supervisor. Finally, although there was no supervisor on duty the evening of October 3, 2010, because it was a weekend, there would have been a charge nurse on duty to whom claimant could have reported her injury.

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible. Where there is conflicting testimony, as in this case, the credibility of the respective witnesses is even more important to the determination of the issues in dispute. Claimant testified she told Ms. Jones of her accident and injury in a face-to-face meeting on October 4, 2010. Ms. Jones denies such a conversation took place. In denying claimant's request for preliminary benefits, the ALJ believed Ms. Jones' testimony over the testimony of claimant. In his Order, the ALJ specifically mentions: "Respondent's representative was a credible witness."⁶ The ALJ made no specific reference to claimant's credibility. The ALJ did find that claimant proved she suffered an accident and injury at work on October 3, 2010, that did arise out of and in the course of her employment with respondent. As such, the ALJ must have given some weight to claimant's testimony. Nevertheless, by finding claimant failed to give notice within 10 days and failed to show just cause for that failure, the ALJ obviously determined that Ms. Jones was the more credible witness.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*⁷, appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."⁸

Here, the ALJ had the opportunity to personally observe the claimant's and Ms. Jones' testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ was able to observe the testimony in person. Having reviewed the entire record presented to date, this Board Member agrees

⁵ P.H. Trans., Cl. Ex. 2 at 6.

⁶ ALJ Order Denying Compensation (May 16, 2011).

⁷ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

⁸ *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

with the determinations made by the ALJ. Claimant has failed to prove that she gave respondent timely notice of accident.

CONCLUSION

Claimant did not give respondent timely notice of accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order Denying Compensation of Administrative Law Judge Brad E. Avery dated May 16, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge